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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KEITH SLAUGHTER, JR., Defendant and Appellant.	G041573 (Super. Ct. No. FSB701492) O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Ronald M. Christianson, Judge. Affirmed in part, reversed in part, modified and remanded for resentencing.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Keith Slaughter, Jr., was convicted of one count of murder, 12 counts of attempted murder, two counts of making criminal threats, one count of assault with a semiautomatic firearm, one count of shooting at an inhabited dwelling, and one count of unlawful taking or driving of a vehicle. Gang allegations and firearm allegations were found true by the jury. Defendant was sentenced to a total term of more than 295 years to life.

On appeal, defendant argues the trial court erred by failing to instruct the jury on attempted criminal threats, as a lesser included offense of making criminal threats. We agree. We exercise our authority under Penal Code section 1260 and *People v. Navarro* (2007) 40 Cal.4th 668, 677 to modify the judgment to reflect convictions for attempted criminal threats on counts 4 and 18, and remand for resentencing.

Defendant also argues there was insufficient evidence of great bodily injury to one of the attempted murder victims. We agree. This victim testified her head was grazed by a bullet from a gun fired by defendant. In the absence of some evidence of the severity of the victim's injury, resulting pain, or medical care required to treat the injury—of which there is none in this case—the statutory requirement of a significant or substantial physical injury has not been proven. We reverse the jury's true finding of great bodily injury on count 11.

Finally, defendant argues, and the Attorney General concedes, the trial court miscalculated defendant's presentence custody credits. We direct the trial court to give defendant credit for the correct number of actual presentence custody credits, but to deduct any presentence conduct credits. (Pen. Code, § 2933.2, subds. (a), (c).)

In all other respects, the judgment is affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Defendant was an active member of the 18th Street Maze gang, a criminal street gang. On or about May 19, 2006, defendant, who was in a vehicle with other 18th Street Maze gang members, approached Ronald Lewis and demanded his "black rag." Another passenger in the vehicle handed a gun to defendant. Lewis backed away from the car and started running; the vehicle followed Lewis, who saw defendant pointing the gun at him as he ran away.

Jessica Barnes knew that defendant was a gang member. On May 20, Barnes drove to 18th Street with her two nieces and two cousins to visit a friend. Defendant was there, and told Barnes he wanted her to leave because she hung out with members of another gang. Defendant displayed a gun and threatened to shoot Barnes. She eventually left.

On May 20 or 21, defendant was "chirping" on the telephone with Jameise Reynolds; Reynolds told defendant to "lose my number, and he told me he would delete me from the world." Reynolds asked defendant if he was going to kill her, and he told her to "take it how I wanted to." Reynolds was concerned, but "never thought twice about it," and defendant's threat did not make her nervous. Reynolds knew defendant was a gang member and carried guns.

On May 22, an informal group was gathered at the home of Eric McIntyre. A silver Dodge Stratus stopped near the house; defendant and two other individuals were in the car. All three occupants of the car began shooting. Jarred Mitchell, 14 years old, was shot in the head, and died. At least four other individuals were shot and injured, including Brittney Houston, who was grazed in the head by a bullet. Sixteen bullets struck McIntyre's house.

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[1] In light of the limited nature of the issues raised on appeal, we provide a truncated version of the facts of this case.

Around 4:45 a.m. on January 24, 2007, Charles Brown's 1999 Ford Expedition was stolen out of his driveway. Later the same morning, shots were fired at James Matthews from a Ford Expedition. In a photo lineup, Matthews identified defendant as someone who looked like the driver of the Expedition.

After a jury trial, Defendant was convicted of the murder of Jarred Mitchell (count 1); attempted murder (counts 3, 5, 7, 8, 10 to 16, and 19); making criminal threats (counts 4 and 18); assault with a semiautomatic firearm (count 6); shooting at an inhabited dwelling (count 9); and the unlawful driving or taking of a vehicle (count 20).[2] Gang allegations regarding all counts were found to be true. On all but counts 4, 18, and 20, the jury found true allegations of personal discharge or use of a firearm.

Defendant was sentenced to a determinate term of imprisonment of 94 years. Defendant was also sentenced to an indeterminate term of imprisonment of 201 years eight months to life, which is to run consecutive to the determinate term. Defendant filed a timely notice of appeal.

DISCUSSION

I.

THE TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY ON THE LESSER INCLUDED OFFENSE OF ATTEMPTING TO MAKE A CRIMINAL THREAT. WE REVERSE THE CONVICTIONS FOR MAKING A CRIMINAL THREAT, BUT EXERCISE OUR AUTHORITY TO MODIFY THE JUDGMENT TO REFLECT CONVICTIONS FOR THE ATTEMPTED CRIMES.

In counts 4 and 18, defendant was charged with making criminal threats against Reynolds and Barnes. Defendant argues the trial court erred because it failed to instruct the jury, sua sponte, on the lesser included offense of attempted criminal threats. We review this issue de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

[2] The jury found defendant not guilty of one count of assault with a semiautomatic firearm, and was unable to reach a verdict regarding one count of the attempted murder of Mitchell.

"A trial court has a sua sponte obligation to instruct the jury on any uncharged offense that is lesser than, and included in, a greater charged offense, but only if there is substantial evidence supporting a jury determination that the defendant was in fact guilty only of the lesser offense. [Citations.]" (*People v. Parson* (2008) 44 Cal.4th 332, 348-349.) Defendant and the Attorney General agree that an attempt to make a criminal threat is a lesser included offense of making a criminal threat. (*People v. Toledo* (2001) 26 Cal.4th 221, 230-231; *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 607.)

The elements of the crime of making a criminal threat are: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo*, *supra*, 26 Cal.4th at pp. 227-228; see also Pen. Code, § 422.) Defendant contends the victims were not "in sustained fear" for their safety, meaning the only crime that could have been committed is the attempt to make a criminal threat.

Reynolds, the victim in count 4, testified that while she and defendant were "chirping" on the telephone, he said, "he would delete me from the world." Reynolds asked defendant if he was going to kill her, and he told her to "take it how I wanted to." Defendant was yelling and cursing, and called Reynolds a "[p]unk ass bitch"; she hung up on him. Although Reynolds thought defendant was threatening to kill her, she "never

thought twice about it" and it did not make her nervous. Reynolds knew defendant was an 18th Street Maze gang member, and knew he carried guns.

Barnes, the victim in count 18, testified she was visiting a friend with her young nieces and cousins, when she was confronted by defendant. He told her she had to leave the area because she hung out with members of a different gang. Defendant displayed a gun during that encounter. Barnes left a few minutes later, after her friend told her to do so. Barnes testified she was not afraid defendant would do anything; she "just really thought that he was talking in front of his friends."

In a recorded interview which was played for the jury, Barnes told the police detective that defendant said, "he was gonna' kill me." Barnes also told the detective she challenged defendant about his accusations that she was hanging out with members of another gang; even though her friend told Barnes she should leave "before [defendant] shoot your car," Barnes "was like I ain't worried about [defendant] 'cause if he didn't have that gun, then I'd get out and whoop his ass like that. I was like, anyway, I'm about to leave anyway, so I left."

Barnes told the detective that before the shooting in front of McIntyre's house, McIntyre asked Barnes if defendant had threatened to kill her. Barnes had replied, "[y]eah, but I'm not worried about him. [Defendant] is a little boy. I don't think about him. I don't think that he'll do nothin' to me. I think that he was just talkin'."

The language of the statute makes clear that the fear felt by the victim must be caused by the defendant's statement of a threat to commit a crime which will result in death or great bodily injury. (Pen. Code, § 422.) Both Barnes and Reynolds testified they were not frightened by defendant's threats.[3] Only after the shooting incident on

[3] Barnes testified she was in fear for the children in her car. Penal Code section 422 addresses "sustained fear for [the victim's] own safety or for his or her immediate family's safety." The phrase "immediate family" for purposes of section 422 means "(a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers and sisters related by blood or marriage; or (c) any person who regularly lives in

May 22, 2006, during which both Barnes and Reynolds were victims of attempted murder by defendant, and during which Reynolds was actually shot, did these witnesses express fear of defendant. There was not sufficient evidence to convict defendant of making criminal threats.

The Attorney General argues the trial court's error did not prejudice defendant, because there was evidence Barnes and Reynolds feared for their safety and the safety of their families at the time of trial. At trial, Reynolds was afraid for her safety, fearful about retaliation, and wanted a police escort to and from the courthouse. Reynolds did not testify her fear resulted from the threat defendant made over the telephone. Barnes did not want to testify at trial and was in fear that her family would have to move because she was testifying against defendant. Evidence of fear caused by testifying against a gang member and alleged murderer is not evidence of fear caused by the threats made by defendant in May 2006. We therefore reverse counts 4 and 18.

Although defendant's convictions for making criminal threats must be reversed, as defendant concedes, substantial evidence supports convictions for the lesser included offense of attempted criminal threats. Under the authority of Penal Code section 1260 and *People v. Navarro, supra,* 40 Cal.4th at page 677, we modify the judgment to reflect convictions for attempted criminal threats, and remand for resentencing.

II.

THERE WAS NOT SUBSTANTIAL EVIDENCE SUPPORTING THE JURY'S FINDING THAT ATTEMPTED MURDER VICTIM HOUSTON SUFFERED GREAT BODILY INJURY.

Defendant argues there was insufficient evidence to sustain the jury's true finding that Houston suffered great bodily injury. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most

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the other person's household . . . ." (CALCRIM No. 1300.) Nieces and cousins are not covered by this definition of "immediate family," and there was no testimony that Barnes's nieces and cousins regularly lived in her household.

favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] '"Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]"' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

The jury made true findings under Penal Code section 12022.53, subdivisions (d) and (e)(1) as to the murder victim, and five of the attempted murder victims. Defendant challenges the true finding only as to the factual finding regarding count 11—the attempted murder of Houston.

Defendant contends that with respect to count 11, the evidence was insufficient to support the jury's true finding under Penal Code section 12022.53, subdivision (d), which mandates a consecutive 25-year-to-life sentence when, in the commission of certain felonies, including attempted murder, the defendant "personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, . . . to any person other than an accomplice." Penal Code section 12022.7, subdivision (f), defines "great bodily injury" as "a significant or substantial physical injury." No specific type of wound or injury is required; the injury must "be 'a substantial injury *beyond* that inherent in the offense itself[.]' [Citation.]" (*People v. Le* (2006) 137 Cal.App.4th 54, 58-59.) Whether an injury is or results in a great bodily injury is a question of fact for the jury. (*People v. Salas* (1978) 77

Cal.App.3d 600, 606.) Proof that great bodily injury has been caused "is commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury. [Citations.]" (*People v. Cross* (2008) 45 Cal.4th 58, 66.)

Houston testified that when the shooting started, she ran up the driveway toward the grass, then "fell" or "dropped" and started crawling. Houston further testified that a bullet "grazed" her scalp, causing "just a little" bleeding. No evidence was presented that Houston required any medical attention, and no photographs depicting Houston's wound were admitted. (The prosecutor asked Houston if she went to the doctor, but did not obtain an answer to that question before asking the next question.) Houston did not testify she suffered any pain as a result of the injury. The evidence offered was not sufficient to support the true finding regarding great bodily injury on count 11.

We hasten to note that our opinion should not be read to hold that great bodily injury can never be shown when a witness testifies he or she was "grazed" by a bullet. Great bodily injury might have been proven with respect to Houston's injury if further evidence had been offered.

III.

DEFENDANT'S ACTUAL CUSTODY CREDITS MUST BE INCREASED, BUT DEFENDANT IS NOT ENTITLED TO ANY PRESENTENCE CONDUCT CREDITS.

The trial court awarded defendant 540 days of actual custody credit and 81 days of conduct credit, for a total of 621 days of presentence custody credit. Defendant argues, and the Attorney General concedes, defendant was entitled to a total of 546 days of actual custody credit, because he was in custody from June 13, 2006 through June 18, 2006, and again from February 20, 2007 through August 12, 2008.

The Attorney General argues, and defendant does not refute, that defendant was not entitled to any conduct credit. Penal Code section 2933.2 precludes presentence

conduct credit for anyone convicted of murder. (Pen. Code, § 2933.2, subds. (a), (c).) Because defendant was convicted of murder, he is not entitled to any conduct credits.

Defendant is entitled to 546 days of credit for actual time served. We direct the trial court to correct the abstract of judgment to reflect the correct number of days of presentence custody credits to which defendant is entitled.

DISPOSITION

Defendant's convictions for making criminal threats in counts 4 and 18 are reversed. The judgment is modified to reflect convictions for attempted criminal threats on those counts. The true finding of great bodily injury on count 11 is reversed. The matter is remanded for resentencing. We direct the trial court to prepare an amended abstract of judgment, crediting defendant with 546 days of presentence custody credit, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.